General Clay Products Corp. *and* Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC and its Local 830. Case 9–CA–26577

March 31, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

On April 26, 1991, Administrative Law Judge Irwin Kaplan issued the attached decision. The Charging Party filed exceptions, a supporting brief, and a motion to remand the case to the judge. The Respondent filed an answering brief to the exceptions, and a brief in opposition to the motion.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

1. The judge found, inter alia, that the $100 Christmas bonus that the Respondent unilaterally gave to all strike replacement employees in December 1988 was not a mandatory subject of bargaining, and that the Respondent therefore did not violate Section 8(a)(5) of the Act, as alleged, by its grant of this bonus. The judge did find, however, that the bonus was discriminatorily motivated, in violation of Section 8(a)(3) of the Act. There are no exceptions to either the dismissal of the 8(a)(5) allegation or the finding of the 8(a)(3) violation, so the unfair labor practice issues raised by these matters are not before us.

The Charging Party has excepted to the judge's recommended remedy for the unlawful grant of a $100 bonus only to the strike replacements. The Charging Party asserts that the Respondent should be required to pay $90 both to employees at its other plants who received the customary $10 Christmas bonus, and to strikers engaged in a strike in violation of the contractual no-strike clause, which was in progress when the bonus was paid.

We find no merit in the Charging Party's exception to the judge's recommended remedy. With respect to the strikers, the General Counsel has not alleged that the work stoppage was protected or that the Respondent violated the Act by discharging them. Although the arbitrator later ordered that the employees be reinstated, we have no basis in the record for finding that, at the time the bonus was awarded, the illegal strikers were employees of the Respondent, for the purposes of Sections 8, 9, and 10 of the Act pursuant to Section 8(d), and thus entitled to any bonus at all. With respect to the employees at the Respondent's other plants, we note that the complaint does not allege, and the parties did not litigate, that these employees were adversely affected by the Respondent's grant of an augmented bonus to the replacements.[3]

2. The judge also found, inter alia, and we affirm, that the Respondent did not unlawfully withdraw recognition from the Union. In this regard, we agree with the judge that the April 19, 1989 petition showing that a majority of the employees did not wish to be represented by the Union was not tainted by the Respondent's failure to comply with the Union's March 13, 1989 request for a current seniority list, which was found (and there is no exception) to be unlawful.

The Charging Party argues in its exceptions that as a consequence of not getting the seniority list in March, it was effectively denied access to the employees, thus stripping the April antiunion petition of any validity as an objective basis for the Respondent's asserted reasonable doubt about the Union's continued majority status.

We find no merit in this argument. First, there is no showing that in requesting a current seniority list the Union was in effect also requesting employee addresses or telephone numbers to enable it to establish contact with the employees. The Union made no express request for that additional information, and no such request can reasonably be implied from the Union's March 13 letter, which simply asked for ''a current seniority list'' for *each* of the Respondent's plants represented by the Union, including the Diamond plant involved in the instant proceeding. In its March 13 request, the Union was seeking an updated version of the seniority list attached to the collective-bargaining agreement. That attached list does not contain em-

[1] The motion is in effect a motion to reopen the record for the introduction into evidence of Arbitrator Hyman Cohen's July 29, 1991 clarification of his March 21, 1989 award. The award itself is in evidence. The motion is denied on the grounds that the evidence sought to be introduced would not require a result different from the one we reach here. Board's Rules and Regulations, Sec. 102.48(d)(1).

[2] The Charging Party has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge that the Respondent did not violate the Act through its refusal to restore seniority to the lawfully discharged illegal strikers on their reinstatement to employment by the Respondent pursuant to the arbitrator's award. In particular, we agree with the judge that the award did not implicitly require the restoration of such seniority. We do not pass on the judge's discussion of what result he might have reached if the award had required the restoration of such seniority.

[3] See *Olympia Plastics Corp.*, 266 NLRB 519, 542 fn. 74 (1983); *American Postal Workers*, 250 NLRB 761 fn. 1 (1980) (''other employees'' not included in make-whole remedy where they were not named in the complaint and their status was not litigated at the hearing).

ployee addresses or phone numbers, but contains only each employee's payroll number, name, date of hire, and job classification. Moreover, the record shows that these seniority lists are updated and posted at each plant on a quarterly basis, and that copies of the posted quarterly list are available to the Union on request.[4]

Further, there is no showing that the Respondent in any way restricted the Union in any attempts it might have made to learn the identity of, or to contact, the employees at any time during the entire 12-month period that the Union represented them—including during the 9 months *preceding* the Union's March 13 request for the current updated seniority list in question.

Thus, we find that the Respondent's unlawful failure to provide the Union with the requested updated current seniority list of Diamond employees in March 1989 did not serve to deprive the Union of access to these employees, and consequently did not undermine the reliability of the employees' April 1989 petition rejecting the Union as their bargaining representative.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, General Clay Products Corp., Nelsonville, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

[4] The Respondent had not yet posted the most current updated seniority list as of the date of the Union's March 13 request for a copy, because it was waiting to see whether the soon-to-be-issued arbitral award would order reinstatement and restoration of seniority of the discharged strikers, as expressly requested in the grievance. The arbitral award that issued about a week later did order reinstatement, but was silent as to restoration of seniority.

Damon W. Harrison Jr., Esq., for the General Counsel.
Stuart M. Gordon, Esq. and *Donald Slowik, Esq. (Porter, Wright, Morris & Arthur)*, of Columbus, Ohio, for the Respondent.

DECISION

STATEMENT OF THE CASE

IRWIN KAPLAN, Administrative Law Judge. This case was heard in Athens, Ohio, on November 15 and 16, 1989, and January 9 and 10, 1990. The underlying charges were filed by Aluminum, Brick and Glass Workers International Union, AFL–CIO–CLC and its Local 830 (collectively the Charging Party or the Union), on June 21, 1989, alleging that General Clay Products Corp. (Respondent or General Clay), engaged in conduct violative of Sections 8(a)(1), (3), (5) and 8(d) of the National Labor Relations Act (the Act). These charges gave rise to a complaint and notice of hearing dated August 4, 1989.

In essence, it is alleged that Respondent engaged in certain discriminatory conduct because a group of discharged striking employees had successfully pursued their terminations under the grievance procedure of the collective-bargaining agreement through arbitration. In May 1988, all the unit employees then working had engaged in a strike in violation of a no-strike clause in the then-current collective-bargaining agreement. The Respondent terminated the strikers and hired permanent replacements. On March 21, 1989, the arbitrator issued his award and, while finding that the striking employees engaged in an illegal strike, he ordered them reinstated but without backpay. Although, the arbitrator was made aware that the Respondent had hired replacements, he did not address their status.

More particularly, it is alleged that on or about April 19, 1989, the Respondent had unlawfully terminated the seniority rights of the former strikers, discriminatorily created a second shift for those employees, changed the pay rate for employee Roger Moore when he performed ''transfer work,'' changed the manner of calculating piece rate pay for unit employees classified as drawers and, on or about June 5, 1989, changed the starting time for the second-shift reinstated strikers. Further, it is alleged that on or about December 19, 1988, the Respondent unlawfully granted the replacement employees a $100 Christmas bonus. In connection with the aforenoted alleged misconduct, it is also alleged that the Respondent failed to provide prior notice to the Union and denied it, as the exclusive bargaining representative, an opportunity to negotiate over such mandatory subjects of bargaining. It is also alleged that on certain dates in June 1989, the Respondent unlawfully laid off or terminated the reinstated former strikers from the second shift. In short, it is alleged that the Respondent, by the aforenoted acts and conduct, violated Section 8(a)(5), (3), and (1) of the Act.

Still further, it is alleged that since on or about March 13, 1989, the Respondent independently violated Section 8(a)(5) of the Act, by failing to provide the Union a requested seniority list, allegedly relevant and necessary to fulfill its bargaining responsibilities and, that the Respondent, on or about May 3, 1989, unlawfully withdrew recognition from the Union.

The Respondent filed an answer conceding, inter alia, jurisdictional facts, the supervisory and agency status of certain individuals, the Union's status as a labor organization, the appropriate collective-bagaining unit and, that since at least June 1, 1986, through May 31, 1989, the Union had been the designated exclusive collective-bargaining repesentative of the alleged appropriate unit and had been recognized as such by the Respondent. In this latter regard, it is conceded that recognition had been embodied in successive collective-bargaining agreements, the last of which, was effective by its terms from June 1, 1986, through May 31, 1989.

The Respondent does not dispute, inter alia, that it had taken away the seniority from all striking employees; that it had given all replacement employees a $100 Christmas gift; that it had changed the starting time for the former reinstated strikers on the second shift; and, that it withdrew recognition from the Union when the last collective-bagaining agreement terminated. However, it raised a number of affirmative defenses, including (asserted) legitimate business reasons for its acts and conduct and denied that it committed any unfair labor practices. Principally, the Respondent relies on the fact that the strikers were unprotected by striking in the face of the no-strike provision of the then-current collective-bargaining agreement. As noted above, the arbitrator also ruled that

the employees were illegal strikers but ordered them reinstated without backpay. According to the Respondent, it negotiated with the Union how the arbitrator's award was to be implemented and that the Union agreed to having the illegal strikers reinstated on or about April 19, 1989, to a newly created second shift, as proposed by the Respondent. The Respondent denied that it terminated the reinstated employees 2 months later, contending that they were laid off because of a substantial drop in sales.

As for withdrawing recognition from the Union, the Respondent relies on a petition, signed by a majority of its employees (all replacements) on April 18 and 19, 1989, that they no longer wanted the Union to represent them.

Based on the entire record, including my observations of the demeanor of the witnesses as they testified, and after careful consideration of the posttrial briefs, I find as follows:

Issues

The principal issues are:

1. Whether, on or about December 19, 1988, the Respondent violated Sections 8(a)(1), (3), and (5) and (8)(d) of the Act, by granting replacement employees at its Diamond plant a $100 Christmas bonus?

2. Whether, on or about April 19, 1989, the Respondent violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act by (a) creating a second shift of employees in the unit at its Diamond plant; (b) terminating unit employees' seniority rights under the then-existing collective-bargaining agreement; (c) changing the rate at which it paid reinstated former striking employee Roger Moore when he performed ''transfer'' work; and, (d) changing the manner or method of calculating piece rate pay for unit employees classified as drawers?

3. Whether, on or about June 5, 1989, the Respondent violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act by changing the starting time of the second-shift unit employees at its Diamond plant?

4. Whether the Respondent, since on or about March 13, 1989, violated Sections 8(a)(1) and (5) and 8(d) of the Act, by failing and refusing to furnish information requested by the Union?

5. Whether, on or about May 3, 1989, the Respondent violated Sections 8(a)(1) and (5) and 8(d) of the Act, by withdrawing recognition from the Union for the Diamond unit, effective on May 31, 1989, the date the then-current collective-bargaining agreement was to expire?

6. Whether, the Respondent violated Sections 8(a)(1), (3), and (5) and 8(d) of the Act, since certain dates in June 1989, by laying off or terminating all second-shift employees in the unit at its Diamond plant?[1]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, General Clay Products Corp., a corporation engaged in the manufacture and sale of bricks at a number of facilities, all in the State of Ohio, including a location at Nelsonville, Ohio. Duing the past 12 months, a representative time period, the Respondent, in connection with its aforenoted business operations sold and shipped products, goods, and material valued in excess of $50,000 directly from points within the State of Ohio to points outside the State of Ohio. The Respondent admits, the record supports, and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

The Respondent admits, and I find, that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE UNFAIR LABOR PRACTICES

A. *Background and Sequence of Events*

The Respondent, General Clay Products Corp., has long been engaged in the manufacture of commercial and residential bricks at six facilities in five locations in Ohio. It owns and operates two plants in Wadsworth, and one each in Diamond, Logan, Baltic, and Goshen, all in Ohio. The allegations in the complaint involve only the Diamond plant, which is located near Nelsonville, Ohio. At the time of the hearing, there were approximately 40 unit employees employed at the Baltic plant; 35 and 30 unit employees at plants 4 and 5 respectively at the 2 Wadsworth locations; 42 at Logan; and, approximately 46 unit employees at the Diamond plant.

The production and maintenance employees at each of Respondent's plants except for the Goshen facility (located in Newcomerstown, Ohio), have long been represented by the Union in separate units under separate contracts. Under the ownership of the Epler family, the Respondent purchased the first of the aforenoted facilities, the Baltic plant, back in 1948; the Wadsworth plant in 1950; the Logan plant in 1954; the Goshen plant (unrepresented) in 1975; and, the Diamond plant in 1978. The Union had already long been the bargaining agent at each of these represented facilities at the time of purchase and the Respondent continued to recognize it as such. Also, where a contract was in place covering the facility at the time of purchase, the Respondent assumed that agreement.

As noted above, the Respondent purchased the Diamond plant, which facility is the subject of the allegations, in May 1978. The Respondent retained the seller's production and maintenance employees, recognized the Union for that unit and continued to implement the same terms and conditions contained in the collective-bargaining agreement due to expire in May 1979. (Tr. 539–539, 542.) However, 1 day after the Respondent purchased the Diamond plant, the unit employees at that location, engaged in a 4- to 5-week strike over Respondent's requirement that they take physicals. Unlike, the instant case, no grievance was filed regarding the Respondent's action and the Respondent did not hire any replacements. Over the next 10 years, the Respondent experienced other strikes (only at the Diamond facility), as noted below. Aside from the circumstances involving the most recent strike which occurred in May 1988, no other unfair labor practices have ever been filed against the Respondent.

The Respondent experienced a second strike at the Diamond location in March 1979 in connnection with the first negotiated contract between the parties for that unit. This was an economic strike almost entirely over a ''closed shop'' versus an ''open shop'' issue and lasted 39 months into June 1982 with a new open shop contact. (In this regard, the union-security provision was no different than any of the

[1] In issue are also whether deferral is required to the parties' grievance-arbitration procedures as well as the extent the arbitrator's award impacts on the instant allegations.

contracts covering the other facilities of the Respondent.) The Diamond facility however, had resumed operations in the spring of 1981 with 25 replacements and 5 or 6 returning strikers. In 1986, there was a 24-hour strike over a misunderstanding regarding certain pay rates under the newly negotiated but then still untyped contract. That strike was precipitated by a supervisor giving erroneous information to employees on the subject of pay. The Respondent and Union met almost immediately and resolved the misunderstanding or dispute. The next strike occurred on May 12, 1988, during the term of the most recent contract and the events related thereto gave rise to the instant case in circumstances described below.

The aforenoted contract by its terms was effective June 1, 1986, through May 31, 1989, and that agreement contained a no-strike provision. (Jt. Exh. 1.) The strike commencing on May 12, 1988, arose over the Respondent's requirement that employees wear safety masks and involved the participation of virtually the entire complement of unit employees, approximately 32 in number. The Respondent, relying on the no-strike clause, dealt with those employees as illegal strikers. Thus, by letter dated May 13, 1988, the Respondent notified the striking employees that they were terminated, effective May 12. (Vol. II, Nov. 16, Tr. 99; Jt. Exh. 1, p. 1.) On May 18, 1988, James Warren, president of the Union, filed a grievance on behalf of all the terminated employees. (R. Exh. 2.) Warren requested reinstatement with full backpay and benefits including seniority. (Id.) The facility was physically closed from May 12, 1988, for a period of 6 weeks. On May 19, 1988, the Respondent began hiring new employees and by mid-June 1988, it had hired a full complement of about 32 permanent replacements.

On October 21, 1988, the termination grievance was processed to an arbitration hearing. The arbitrator was advised at the hearing that the Respondent had hired replacements for the strikers. (Tr. 93–94.) On March 21, 1989, the arbitrator issued his decision. (Jt. Exh. 2.) He ruled, in pertinent part, that the strikers had engaged in an illegal strike but ordered that they be reinstated without backpay.[2] He added: ''They are to be cautioned that should they commit the offense of committing an illegal strike in the future, they will be discharged.'' (Id. at 53.) While, as noted above, the arbitrator was aware that the strikers had long been replaced, his decision is silent on the status of those replacements or whether the striking employees are to be reinstated even if it required terminating the replacements.

Back on December 19, 1988, approximately 3 months antedating the arbitrator's award, the Respondent gave all its replacement employees a $100 Chirstmas bonus. The Respondent's president, Harold B. Epler Jr., testified that he provided this gift to thank these employees for coming to work during that very difficult time. (Tr. 517.) Only the Diamond plant's replacement employees received this amount; the unit employees at Respondent's other plants received a $10 gift certificate. For a number of years prior thereto, the Respondent had given all its employees at its various plants the same gift for Christmas, a $10 gift certificate from Kroger's grocery store. In earlier years, the Respondent had provided a turkey or ham or a certificate for such at a local grocery store. According to reinstated striker Roger Mohler, he had been receiving the $10 Christmas certificate every year since 1978, when he first started working for the Respondent. The only other time the Respondent provided a $100 Christmas gift or bonus was back in December 1981 during another strike at the Diamond plant and, assertedly for the same reason, to wit, to thank the replacement employees and or any employees who abandoned the strike for coming to work.

The Christmas bonus had never been the subject of negotiations or a grievance and it appears that the Union had never been given prior notice of Respondent's intentions prior to its grant. According to counsel for the General Counsel, by not affording the Union the opportunity to bargain over the 1988 Christmas bonus, the Respondent violated Section 8(a)(1) and (5) of the Act. It is also alleged that Respondent provided the Christmas bonus for reasons violative of Section 8(a)(3) of the Act. The Respondent contends, inter alia, that ''the making of the $100 Christmas gift was not a mandatory subject of bargaining,'' in the circumstances of this case, and denied that it was discriminatorily motivated. (R. Br. 54–58.)

By letter dated March 13, 1989,[3] some 8 days before the arbitrator issued his decision, the Union's International representative, Michelle Laghetto, requested of Epler as follows:

> Please send me a current seniority list for the following plants covered by collective bargaining Agreements [sic] with the Aluminum, Brick and Glass Wokers; Wadsworth, Baltic, Logan and *Diamond*. [Emphasis added; Jt. Exh. 7.]

According to Laghetto, insofar as her request relates to the Diamond plant, the contract covering that unit was soon to expire (May 31), and she was preparing herself for the anticipated negotiations for a new agreement. Laghetto noted that she had not yet received the arbitrator's decision and did not know who the replacements were or how many of them were then working. She testified that she wanted to meet with the replacement employees to get their input in preparation for the new contact negotiations. (Tr. 59.) At the time of the request, the Respondent's practice was to post a quarterly seniority list in each plant near the timeclock. The list contains the employee's name and date of hire.

According to Epler, while a quarterly seniority list had been prepared and typed on March 20, it had not been posted that quarter, due largely to the the uncertainties regarding the employees constituting the work force as the arbitrator's decision had not yet issued. Epler testified that at the time the request arrived at his office, he was attending a brick institute meeting in Arizona and did not see Laghetto's letter until the morning of March 21, the same day the arbitrator issued his decision which he received a day or two later. By

[2] The arbitrator's award denied reinstatement for James Warren, Steven Dickerson, Billie Mitchell, Jerry Mitchell, and Thomas Mitchell on the basis that each of them had been dicharged for cause. He found that Warren, as president of the Union, was more culpable than the other employees engaged in the work stoppage. (Id. at 50.) As for Billie, Jerry, and Thomas Mitchell, and Steve Dickerson, the arbitrator found that they had engaged in an illegal slowdown between May 10 to 12, 1988, for which they were first suspended and later discharged and that the suspensions ''prompted the [illegal] walkout.'' (Id. at 15–16; 45–48.)

[3] All dates are in 1989, unless otherwise indicated.

letter dated March 23, Epler asked Laghetto to meet with him to discuss implementing the arbitrator's award and suggested an April 6 date. (Jt. Exh. 3.) Epler asserted that he waited until May 10 to respond to Laghetto's request for the seniority list because of questions raised by the arbitrator's award and he did not know which of the strikers as coming back nearly 11 months after the strike began. On May 10, Epler wrote Laghetto as follows:

> You recently contacted my office requesting seniority lists for various General Clay plants. In order that I may be able to respond to your request, I would appreciate your advising me with regard to each of the plants the reason for this request.
>
> I will await a response from you before submitting the seniority lists. [Jt. Exh. 8.]

Laghetto did not respond to Epler's May 10 letter. At the hearing Laghetto explained why: ''[I] [f]eel that [the Union] as the bargaining agent for the plants that I am entitled to this information in order for me to properly represent these employees.'' (Vol. 1, Tr. 50.)

As noted above, back in March, Epler wrote to Laghetto suggesting that they meet on April 6 to discuss the implementation of the arbitrator's award and a meeting on that date was held. Present on behalf of the Respondent were President Epler, Diamond Plant Manager David Diehl, and Respondent's attorney Stuart Gordon. The Union was represented at this meeting by International Representative Laghetto, Hootie Wend, a union committeeman, and employees Jeff Hutchinson, James Wend, and Lloyd Dale Richmond (all of them, with the exception of Laghetto, were employees to be reinstated pursuant to the arbitrator's decision). Laghetto and Attorney Gordon served as the principal spokespersons for their respective sides.

Laghetto testified, without contradiction, that in Gordon's opening remarks at the April 6 meeting, he advised the Union that the Respondent would place a disciplinary letter in every employee's file who had participated in the illegal work stoppage with the warning that if they do so again they would be immediately dismissed. Gordon proposed that the employees be reinstated as vacancies occur as the Respondent then had a full complement of employees at the Diamond plant. Laghetto stated that she wanted the former strikers reinstated immediately and recommended the following Monday, April 10. Gordon stated that it was not appropriate to provide illegal strikers with greater consideration than the rights enjoyed by lawful economic strikers. Laghetto also explored the possibility of going back to the arbitrator for clarifications which Gordon made clear, the Respondent would be unwilling to do. During this meeting Laghetto advised the Respondent that four of the striking employees who were eligible fo reinstatement would not return and perhaps another employee, Valley Johnson might retire. The parties did not come to any agreement at that meeting.

According to Epler, after the April 6 meeting, he decided to propose a second shift as a way to accommodate the Union's desire to have the former strikers reinstated immediately as well as satisfying the Company's desire to fully utilize the Diamond plant's improved production capacity.[4] (Vol. 1, Jan. 9, Tr. 487–490.) The Respondent was also about to embark on its busy season.

By letter from Attorney Gordon, to Laghetto, dated April 11, the former reiterated the principal positions taken by each side at the April 6 meeting and set forth an alternative proposal for creating a second shift in order to reinstate the returning strikers to work on that shift. (Jt. Exh. 5.) There, Attorney Gordon also suggested, that if the Union were agreeable, that the parties meet on April 14 to discuss the matter further. Gordon also suggested that the former strikers return to work on Wednesday, April 19, at 2 p.m., the beginning of the second shift. (Id.)

The parties met again on April 14, as suggested by Gordon in his April 11 letter. Present for each side were the same persons who attended the April 6 meeting. The Respondent presented its alternative package to its earlier April 6 proposal which now included reinstating the former strikers on a newly created second shift. In connection therewith, the Respondent had prepared a list of items which were read off to the union representatives from a sheet of paper. (R. Exh. 15.) The package provided, inter alia, that the second shift operate from 2 p.m. to 10 p.m., but neither the reinstated strikers on that shift nor the employees on the first shift would be guaranteed any set number of working hours. Further, the returning strikers would come back with a loss of their seniority and must return by April 19 or be terminated. (Id.)

For the most part, until the Respondent raised the point that the strikers had to return to work by April 19 or be terminated, the union representatives listened to the package without responding to its various items. On the item dealing with recall of the former strikers, Laghetto countered that the contract should be followed in the same manner as the time limits for laid-off employees are observed. Laghetto also expressed her concern about an employee who was a hospital patient and would not be released in time for the April 19 reporting date. Epler and Diehl indicated that they would be able to accommodate that individual.

According to Laghetto, the Union was going to do whatever was necessary to get the former striking employees reinstated and told the Respondent's representatives as much. However, Laghetto also asserted that she conveyed her disagreement with Respondent that the returning employees had to go on the second shift as well as their loss of seniority but would pursue their rights in a lawsuit against the Com-

[4] In late 1984 or early 1985, the Diamond facility was converted to produce tumble bricks. These bricks possess a weathered, irregular texture of the colonial type and while Respondent's other plants also produced tumble bricks, those bricks lacked certain special characteristics made only at the Diamond plant. The demand for the Diamond produced tumble brick was high, particularly the product lines known as St. Lorain and Whitehall and 1986 and 1987 were banner years. In order to satisfy the increased demand, the Respondent added a shuttle kiln which increased its production capacity at the Diamond facility by 15 percent. In January 1988 the Diamond plant was shut down until March 1988, for further modernization including improvements to operate the tunnel kiln at a faster speed. (Vol. II, Nov. 16, Tr. 67; Vol. I, Jan. 9, Tr. 463–464, 466.) In March 1988, Plant Manager Diehl first raised the specter of a second shift with President Epler, to better utilize the plant's increased production capacity. (Vol. I, Jan. 9, Tr. 634.) The year 1988, was another banner year for the residential brick industry. (Vol. I, Nov. 15, Tr. 198–199.) The promising orders for residential brick from the Diamond facility for 1989 were based largely on the experience of the previous few years. (See, e.g., Vol. I, Nov. 15, Tr. 200.)

pany. Laghetto did not expressly object to any of the Respondent's conditions and represented that the former strikers would return to work. On the other hand, she denied that the Union ever agreed to Respondent's package but merely accepted an opportunity for the former striking employees to be reinstated. (Vol. I, Nov. 15, 1989, Tr. 43–44; Vol. I, Jan. 9, 1990, Tr. 498.) The Respondent contends that the Union either impliedly accepted the Respondent's package to implement the arbitrator's award or, in the alternative, there was an impasse to justify the Respondent's implementation thereof. (Vol. I, Nov. 15, 1989, Tr. 21–22.)

By letter dated April 14, Epler notified the former strikers who were encompassed by the arbitrator's reinstatement ruling, to report to work on the second shift at 2 p.m. on Wednesday, April 19 or, ''[f]or good cause shown . . . until Monday, April 24.'' (R. Exh. 16.) In all, 20 out of approximately 28 eligible employees returned and they came back to work between April 19 and 24.

Roger Moore, was one of the reinstated employees. Prior to the May 12, 1988 strike, he was employed as a kiln car repairman and also a transfer operator. He earned the same $7.35 an hour prior to the strike without regard to which of the aforenoted jobs he performed. According to Moore, when he was first reinstated, he was paid $7.20 an hour for transfer operator work and was paid the higher $7.35 an hour only when he performed kiln car repair work. After Moore complained to his superiors sometime in May, the Company paid him the higher rate for both jobs. (Vol. I, Tr. 178–180.) It is alleged that the Respondent changed Moore's rate of pay, when he was reinstated, for reasons violative of Section 8(a)(3) and that it was also done unilaterally and without bargaining in violation of Section 8(a)(5). Respondent contends that Moore, as well as the other former striking employees were reinstated consistent with the conditions set forth in its proposal of April 14. It also denies that it was discriminatorily motivated, noting, inter alia, that it adjusted Moore's wage rate upwards to the prestrike level before any charges were filed.

It is also alleged that Respondent violated Section 8(a)(3) and (5) by ''chang[ing] the manner or method of calculating piece rate pay for unit employees classified as drawers'' in April, after the employees were reinstated. (G.C. Exh. 1(c), p. 3, par. 7(e).) Basically, drawers unload burnt brick from a kiln car segregating the good or ''A'' grade brick from the bad, i.e., cracked, also referred to as scrap brick. The good brick is loaded onto a jig or bander machine; the scrap is disgarded and thrown into a dumpster tub. The typical kiln car contained approximately 5-percent scrap. (Vol. I, Nov. 15, Tr. 129.) Employees employed as drawers are compensated on a piece rate basis. Reinstated employees Roger Mohler and James Wend testified that prior to the May 1988 walkout, as drawers, they were paid by the per thousand brick (divided by the number of drawers as a team, usually four) which they removed from the kiln car and included both ''A'' grade and scrap. However, they asserted that after they were reinstated, they no longer received compensation for scrap but only for the ''A'' grade brick coming out of the machine and banded or strapped.

Mohler and Wend relied principally on what they understood they were told by either their immediate superior, Harland (Buddy) Walker or Plant Manager Diehl. No pay stubs or other documentary evidence was introduced. Diehl denied that the method for calculating the pay for drawers changed after the employees were reinstated on April 19 or that the matter had previously been brought to his attention. He also denied having any knowledge of what Walker told employees regarding changes in the way they were paid and did not authorize him to convey any message to employees on this subject. According to Diehl, the subject (drawers compensation) was covered by contract and could not be changed without the Union's approval. (Tr. 776–777.)

Effective June 5, the Respondent changed the starting time for the reinstated second-shift employees from 2 p.m. to 3 p.m. Diehl testified that since the first or second week in May, he had heard on two or three occasions, complaints from some of the permanent replacement employees, that they were uncomfortable and felt harassed by contact with former striking employees as the respective groups entered and left the plant at the start and completion of their respective shifts. More particularly, as testified by Diehl, the first-shift employees complained that as they were on the way out of the plant they were confronted by three or four former strikers who would form a line in front of them. There were no reports of actual physical contact. Diehl testified that Epler decided to address this problem by changing the starting time for the second shift.

Diehl testified that the Company had changed the starting time at the Diamond plant on a number of occasions prior to the time in question and the Union had not objected to such unilateral action. The Respondent argues that in any event, the change in shift hours occurred following the expiration date in the contract and the Respondent's withdrawal of recognition. Thus, Respondent argues that it had no obligation to consult the Union regarding the change. (R. Br. 88–89.)

The Respondent's withdrawal of recognition is predicated almost entirely on a petition signed by 30 of the 32 replacement employees on April 18 and 19 stating that they do not wish to be represented by the Union, which petition was presented to Diehl on or about April 19. (R. Exh. 1.) Approximately 17 or 18 of the former strikers returned to work on April 19 and the other 2 or 3 employees to be reinstated returned on or before April 24. Diehl turned over the petition to Epler later the same day. By letter dated May 3, Epler advised Union International Representative Laghetto as follows:

> A majority of the employees in the bargaining unit at the Company's Diamond, Ohio plant have provided the Company with objective evidence that they no longer wish to be represented by your Union. Accordingly, we will not recognize your Union as the majority representative of our Diamond plant employees once the existing contract expries [sic]. Under these circumstances, the negotiation meeting we scheduled for May 10 is hereby cancelled. [Jt. Exh. 6.]

The contract expired on May 31. Laghetto did not respond to Epler's letter of May 3. Admittedly, the Respondent withdrew recognition from the Union with regard to the Diamond unit immediately after the contract expired.

Over a period commencing on or about June 7 to on or about June 23, the Respondent laid off all its second-shift employees. According to Epler, he took this action because of an unexpected and severe downturn of business in the res-

idential brick industry. (Vol. II, Nov. 16, Tr. 194–195; R. Exhs. 10 and 11.) This led to large cancellations of orders and a corresponding increase in the level of inventory. (Id., Tr. 148–149, 182–183, 189–191, 194–195; R. Exhs. 10 and 11.) Epler asserted that 90 to 95 percent of the product line manufactured at the Diamond facility is directed toward residential construction (single-family or multiple-family units). (Id. at Tr. 84.) Insofar as the sharp downturn in business at that time, this condition was largely corroborated by the testimony from officials of distributor-customers of Respondent.

As will be discussed more fully infra, counsel for the General Counsel contends, that the Respondent never intended to maintain a viable second shift but that it was a sham creation to give the appearance of compliance with the arbitrator's award. (G.C. Br. 22–23.) Further, in laying off or terminating the second-shift employees approximately 2 months after they were reinstated, the Respondent merely completed the (asserted) sham.

B. *Discussion and Conclusions*

1. Whether the Respondent violated Section 8(a)(1), (3), and (5) by unilaterally providing a $100 Christmas bonus or gift

It is undisputed that on December 19, 1988, the Respondent unilaterally and without notice to the Union, provided each of its replacement employees employed at its Diamond plant $100 for Christmas. The record disclosed that since around December 1982, General Clay provided its Diamond unit employees a Christmas gift certificate for the purchase of a turkey or ham at Kroger's grocery store. However, since 1983 or 1984 until 1988, General Clay gave those employees a $10 Chistmas gift certificate for the purchase of any item at Kroger's. The $10 Christmas gift was the same for employees at all of Respondent's plants except in 1988 when only the employees at the Diamond plant received $100.[5] Respondent contends, that what the General Counsel characterized as a $100 Christmas bonus in 1988, for the Diamond replacement employees, was actually a lawful gift within the meaning of the Board's decision in *Benchmark Industries*, 270 NLRB 22 (1984), and as such, not a term and condition of employment or mandatory subject of bargaining.

In *Benchmark*, the employer gave all its employees for Christmas, a holiday lunch or dinner and 5-pound hams for 3 consecutive years (1978–1980), before it unilaterally discontinued granting this benefit in 1981. There, as in the instant case, the benefits were the same for all the employees without regard to employment-related factors such as work performance, earnings, seniority, or production.[6] The Board, in *Benchmark*, treated the Christmas dinners and hams as ''token items'' and the grant thereof as ''merely gifts.''(Id.) Having found that the gift was not a term and condition of employment, the Board found that the employer could lawfully discontinue the benefit unilaterally without violating Section 8(a)(5) of the Act. See also *Harvstone Mfg. Corp.*, 272 NLRB 939 (1984).

While noting the similarities in the instant case to *Benchmark*, there are also some notable differences. Thus, here, the Christmas benefit provided for a far longer period (at least from 1983 through 1987) than the 3 consecutive years involved in *Benchmark*, which period the Board viewed as ''relatively short.'' (Id. at fn. 3.) Also, here, rather than discontinuing the grant of the gift or bonus, General Clay actually increased the size of the bounty tenfold, from a $10-gift certificate to $100.

In assessing the factors which tend to both support and militate against encompassing the instant case within the parameters of *Benchmark*, I lean toward inclusion largely because all the Diamond employees received the same amount regardless of seniority and other employment-related factors noted above, which are generally tied to employee remuneration or pay. See *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210, 214 (8th Cir. 1965), denying enf. in pertinent part to 147 NLRB 179 (1967), and relied on by the Board in *Benchmark*. As for the increased size of the 1988 gift, I believe, that in the circumstances of this case, the change reflects more on Respondent's motivation than of uplifting a gift to the level of term and condition of employment within the meaning of Sections 8(a)(5) and 8(d). *Benchmark Industries Corp.*, supra; *Harvstone Mfg. Corp.*, supra. Accordingly, I shall recommend that these allegations be dismissed.[7]

As noted previously, it is also alleged that Respondent's Christmas bonus (found to be in the nature of a gift) given only to the replacement employees at the Diamond plant in 1988, constituted a violation of Section 8(a)(3) of the Act. Clearly, the Respondent was under no obligation to provide a similar gift to the then-discharged illegal strikers. On the other hand, neither did the Respondent give the same Christmas gift to employees at its other locations, the great majority of whom are represented by the Union. In this regard, it is noted that the Respondent had long given the same Christmas gift to all its employees, regardless of plant location. Why then the change? On the state of this record, it appears that a fair inference is that the untypically generous size of the gift (10 times the normal amount) is attributed to the Respondent's desire to reward or impede employees in order to discourage them from in engaging in certain concerted activities, as alleged. The last time the Respondent so rewarded or singled out Diamond employees was back in December 1981 during a long economic strike when he gave $100 to each

[5] The Respondent also rewarded each of its Diamond employees who worked during an economic strike back in 1981 with $100 for Christmas and gave the much smaller gift to employees at the other facilities in the same relative manner as in 1988. As testified by Epler, on both occasions ''[w]e wanted to thank the employees for comming to work.'' (Vol. I, Jan. 9, 1990, Tr. 515–517.)

[6] Here, the striking employees had gone out in violation of the contractual no-strike clause for which they were lawfully terminated in May 1989. Thus, when the Respondent gave each replacement employee $100 in December 1988, they were the only employees employed at the Diamond facility.

[7] The Respondent also raised in its answer, as an affirmative defense, that the Christmas gift in question, which was given on December 19, 1988, is time-barred under Sec. 10(b) of the Act. The underlying charges were filed on June 21, 1989, just outside the 10(b) period. However, the record disclosed, and I find, that the Union did not have knowledge of the gift until on or about December 28, 1988, and, as such, the charges are appropriate for consideration on the merits within the meaning of Sec. 10(b) of the Act. (Vol. I, Nov. 15. 1989, Tr. 58; Vol. I, Jan. 9, 1990, Tr. 517–518.) See, e.g., *Lehigh Metal Fabricators, Inc.*, 267 NLRB 568, 576 (1983); *Plymouth Locomotive Works, Inc.*, 261 NLRB 595, 598–599 (1982).

of its replacement employees and to the handful of other employees who abandoned that strike.

According to President Epler, he gave the replacement employees the more generous Christmas gift in 1988 for the same reason in 1981, to thank them for coming to work. In December 1981, when the Chistmas gift was given, the strike was still ongoing and had long been in progress. That strike began when the contract expired in May 1979. Thus then, unlike the circumstances in 1988, there was not any no-strike clause in effect at any time during the course of that strike nor is it contended that the strike was otherwise illegal. In these circumstances, noting, inter alia, Epler's reason advanced for providing the more generous gift, the conclusion is inescapable that the grant did not turn on whether the strike was illegal but rather to reward employees for not engaging in a strike, legal or otherwise.

In view of the foregoing and on the entire state of the record, I am persuaded that the Respondent was discriminatorily motivated in violation of Section 8(a)(3), by departing subtantially from past practice in giving its replacement employees 10 times the amount normally given for Christmas.[8] Accordingly, I find that the Respondent violated Section 8(a)(3) of the Act, as alleged.

2. Whether Respondent, on or about April 19, 1988, violated Sections 8(a)(1), (3), and (5) and 8(d) by creating a second shift, terminating the seniority of illegal strikers, and making certain changes with regard to pay rates

a. *Creating a second shift and terminating the seniority of illegal strikers*

As noted previously, the Respondent asserted that it created the second shift to accommodate the Union's desire to have the former striking employees reinstated immediately as well as to satisfy its own desires to more fully utilize the improved production capacity at the Diamond plant. According to counsel for the General Counsel, the Respondent created the second shift as a sham transaction to avoid legitimate reinstatement of the strikers while attempting to give the appearance of compliance with the arbitrator's decision.

The strike involved occurred on May 12, 1988. It is undisputed that the strike occurred in violation of the no-strike provision of the then-current collective-bargaining agreement. For doing so, the Respondent notified the striking employees by letter dated May 13, 1988, that they were terminated. The terminations became the subject of a contractual grievance and on October 21, 1988, the matter was eventually heard in arbitration. On March 21, 1989, the arbitrator issued his decision. He found that four employees who were classified as hackers were discharged for just cause for engaging in an unprotected work slowdown and that a fifth employee, Union President James Warren, was also discharged for just cause because, inter alia, he instigated the work slowdown as well as the illegal walkout on May 12. It is not contended that the aforenoted five discharged-for-cause individuals are encompassed by the instant complaint. As for the 28 other unit employees, the arbitrator found that while they violated the contractual no-strike clause and were illegal strikers, he ruled that they be reinstated without backpay with a warning that they faced discharge if they did so again.

The General Counsel contends that the Respondent was obligated to reinstate the illegal strikers (those who were not specifically found to have been discharged for cause) to their former jobs on the first shift, discharging, if necessary, the permanent replacements. While the General Counsel does not dispute the fact that the striking employees lost their status as employees for their walkout in violation of the no-strike clause and Section 8(d) of the Act, he maintains (without citing any authority), that their seniority and other rights were resurrected when the arbitrator ordered them reinstated, albeit, without backpay. It is noted that the arbitrator omitted any reference to seniority and other benefits although these items as well as reinstatement and backpay were specifically requested as the remedy under the grievance (R. Exh. 2). Section 8(d) merely restores ''certain benefits and protections under the Act when the [the illegal striker] is reemployed by [the discharging] employer.'' It does not contain any provision restoring seniority and other benefits on reemployment.

If, as the General Counsel contends, that the retention of seniority is implicit, and that the employer was obligated to discharge the replacement employees to make room for the illegal strikers, I would find deferral inappropriate as palpaply inconsistent with Section 8(d) of the Act. See generally *Cone Mills Corp*., 298 NLRB 661 (1990). In *Cone Mills* (which did not involve Sec. 8(d)), the Board refused to defer where the arbitrator found that the discharge was predicated solely on union activity but he still awarded reinstatement although without backpay. There, the Board treated the arbitrator's less than make-whole award as repugnant and not susceptible to an interpretation consistent with the Act. Here, of course, the arbitrator's award was less than whole because of the illegal (rather than protected) nature of the activity. Given the undisputed illegal nature of the activity, I find, contrary to counsel for the General Counsel, nothing to justify reading favorable features into the arbitator's decision such as seniority and other benefits, when the arbitrator rejected backpay and made no reference to the other items. As noted by counsel for Respondent, to adopt the General Counsel's position would also result in the anomaly of providing illegal strikers greater rights than lawful economic strikers. Compare *Laidlaw Corp*., 171 NLRB 1366 (1969), enfd. 414 F.2d 99 (7th Cir. 1969) (an economic striker who offers to return to work replaces the permanent replacement when the slot become vacant).

The General Counsel does not contend nor does the record suggest otherwise, that the no-strike clause in question was inoperative because the employer's unfair labor practices prompted or prolonged the strike. Compare *Mastro Plastics Corp. v. NLRB*, 350 U.S. 270 (1956). Indeed, the earliest of the complaint allegations relates to the Christmas bonus awarded the replacement employees in December 1988, appoximately 7 months after the illegal strikers were discharged. Similarly, it is not contended that the strike was justified to protest safety conditions. Thus, Section 502 of the Act, which under certain circumstances may preempt contractual no-strike provisions is not involved. In fact, the arbitrator specfically found that the illegal strike was not over safety conditions. (Jt. Exh. 2, p. 41–42.)

[8] It is noted that subsequently, the Respondent again treated the replacements more favorably by discriminatorily changing the starting time of the reinstated strikers. See sec. 3, infra.

Given the nature of the arbitrator's award, Epler was faced with the dilemma of satisfying the reinstatement aspect in the face of his desire to retain permanent replacement employees. For reasons noted above, the Respondent was under no legal obligation to dislodge the latter group to make room for the illegal strikers. The Diamond plant then operated on one regular daytime shift as did all of Respondent's other plants and employed a full complement of 32 employees. Faced with limited options, I do not find Epler's offer to the Union at the parties' first meeting to discuss the arbitrator's award, to wit, to reinstate the illegal strikers without backpay to slots left vacant by permanent replacement employees as reflecting bad faith (they had been lawfully discharged approximately 11 months earlier).

Similarly, I fail to discern bad faith on the part of Respondent when almost immediately after that first meeting ended, Epler decided to test the relatively recent improvements in the Diamond plant's capacity to produce by exploring with the Union an offer to reinstate the former strikers on a newly created second shift. The record disclosed that Epler made that decision against a backdrop of greater demand for residential brick over a 3-year period, and they were facing the busy season in production. In these circumstances and on the state of the entire record, I am unpersuaded that the General Counsel has demonstrated that Epler's decision to create the second shift was a ''sham transaction.'' While instituting a second shift was unprecedented in Respondent's history, so were the confluence of factors that supported the viability of proposing such action at that time. Thus, I am persuaded that Epler made a genuine search to comply with an award which left an anomalous condition (reinstating illegal strikers), while at the same time fulfilling his bargaining responsibilities in highly unusual circumstances. Accordingly, I shall recommend that these allegations be dismissed.

b. *Alleged changes in pay rates*

(1) Employee Roger Moore

Moore was a reinstated illegal striker. Prior to the May 1988 strike, Moore was a kiln car repairman/transferman. He was paid the same $7.35 an hour whether he performed kiln car repair work (the contract rate for that classification) or worked in the transferman classification (contract rate was $7.20). According to Moore, when he was reinstated in April 1989, he did not receive the higher kiln car repairman's rate when he performed transferman work. It is alleged that the Respondent made a unilateral change in Moore's rate of pay as a transferman in violation of Sections 8(a)(1), (3), and (5) and 8(d). The Respondent contends that Moore's assignments and rate of pay were consistent with its package proposal for reinstating the strikers made to the Union at the April 14, 1989 meeting and that it fully satisfied its bargaining responsibilities. As for the 8(a)(3) allegation, the Respondent denied, inter alia, animus or unlawful motivation.

The record disclosed that the Respondent informed the Union at the April 14 meeting that under its package proposal there was not enough work for a full 8-hour second shift but only 6-1/2 to 7 hours and that the returning strikers might not necessarily be reinstated to the bid-in-jobs they held prior to the time they went out on strike. The Union was anxious to have the strikers reinstated as soon as possible on virtually any basis and did not debate this point. Instead, Laghetto advised the company negotiators, that the Union would explore its legal rights elsewhere. In Moore's case, the record disclosed that he was reinstated on the second shift to the transferman's classification. The kiln car work was assigned to two kiln fireman (also reinstated former strikers) who had shuttle kiln responsibilities in the same area. They were paid the higher kiln fireman rate even when they performed kiln car repair work. In any event, in May 1989 when Moore complained, Plant Manager Diehl moved a kiln fireman off the car repair work and saw to it that Moore received the higher kiln car repair/tansferman rate.[9] Diehl made the adjustment to satisfy Moore without a grievance having been filed and before any unfair labor practice charges were filed on this subject. There in no evidence that Moore was more supportive of the Union than other striking employees.

In the circumstances of this case, I find that the General Counsel has not established by credible probative evidence that the Respondent changed Moore's rate of pay in violation of the Act, as alleged. Accordingly, I shall recommend that these allegations be dismissed.

(2) The basis for calculating the pay of employees classified as drawers

Prior to the strike, employees classified as drawers were compensated on a piece rate basis for combined good brick and scrap which they unloaded from the kiln cars. It is alleged that the Respondent unlawfully discontinued compensating the drawers for the cracked brick or scrap when the strikers were reinstated on or about April 19, 1989. This allegation rests entirely on the testimony of reinstated employees Roger Mohler and James E. Wend. According to their testimony, soon after they were reinstated they questioned their immediate supervisor, Harlan (Buddy) Walker, regarding the method of calculating their pay and were told that they would be paid by the strap (comprising only ''good brick''). Wend testified that Diehl told him that the ''[calculation] works out the same.'' (Vol. I, Nov. 15, Tr. 144.) Plant Manager Diehl denied that the drawers were no longer paid for scrap or that the basis for calculating their pay had changed when the strikers were reinstated. The parties stipulated that the company records corroborate Diehl's testimony insofar as calculating the rate of pay for drawers for 1988 and 1989. (Tr. 768–769.) Diehl also denied that Walker ever had the authority to tell anyone that drawers would not get paid for scrap.

The record also disclosed that when both Mohler and Wend were reinstated, they were assigned work mostly as general laborers rather than as drawers, at a lower rate of pay. However, when they worked as drawers they were paid as employees in that classification. They did not produce pay stubs or other documentary evidence to support the allegation that the Respondent changed the method of pay for drawers. Nor was a grievance under the contract then still in effect ever filed.

[9] While it is undisputed that Moore's wage rate was adjusted upwards after he complained, his testimony as to when he received this adjustment as well as on other matters is vague, inconsistent, confusing, and unreliable. Even the General Counsel had to acknowledge that Moore's testimony was confusing. (Vol. I, Nov. 15, Tr. 184.)

In view of the foregoing, noting particularly the limited nature of the testimony and evidence otherwise supporting the allegation and the stipulation corroborating Diehl's testimony in a critical area, to wit, that the method for calculating the pay for drawers had not changed for the years 1988 and 1989 (the material time period), I find that the General Counsel failed to demonstrate that the Respondent made the change as alleged. Accordingly, I shall recommend that this allegation be dismissed.

3. Whether the Respondent changed the starting time for second-shift employees in violation of Sections 8(a)(1), (3), and (5) and 8(d)

In April 1989, when the second-shift was instituted, the first shift ended and the second shift began at 2 p.m. Thus, there was some overlapping of first and second-shift employees leaving and entering the Diamond facility. On June 5, 1989, the Respondent changed the starting time of the second shift from 2 p.m. to 3 p.m. According to Diehl, the change was made because he had received some complaints from three or four replacement employees around the first or second week in May. They assertedly told Diehl, that three or four of the reinstated second-shift employees would stop in a line in front of them between shifts while the replacement employees were on the way out the plant and the replacement employees felt uncomfortable.

As testified by Diehl, the replacement workers did not indicate to him that the second-shift employees engaged them in fighting or any other physical contact. Diehl acknowledged that he did not personally observe any of the conduct complained of by the replacement employees. He could not recall the names of any of the employees who complained. While Diehl asserted (without corroboration) that he conducted an investigation which consisted of making inquiries of his foremen, they (the foremen) were either not in the area when the alleged incidents occurred or were unaware whether such incidents happened. (Tr. 815.) Diehl did not question any of the reinstated strikers.

Against the foregoing backdrop, Diehl, after getting approval from Epler, called a brief meeting of second-shift employees to advise them that there starting time would change to 3 p.m. effective the following Monday. He did not give them any reason for the change. In the circumstances of this case, I find that the Respondent made the change for reasons violative of Section 8(a)(3) and (1).[10] As noted previously, employees who lose their status under Section 8(d) of the Act, regain the status and the protections of the Act when reemployed. Thus, the Respondent could no longer discriminate against those reinstated employees (even though they lawfully lost their seniority) for engaging in the earlier illegal strike.[11]

Here, I find that the record clearly supports the inference that the Respondent favored the replacements at the expense of the reinstated strikers by relying on a few unsupported complaints without even questioning the accused reinstated employees for their account of what allegedly occurred. Diehl's vague and uncorroborated testimony justifying the change is hardly reliable. As noted above, Diehl could not recall the names of the complaining employees and his foremen could not corroborate that any of the alleged confrontations between replacement employees and the second-shift employees ever took place.

It is also noted, that whenever changes were made in the past regarding working hours (unlike the occasion in question), such changes generally involved efforts to best deal with weather conditions and a posted memorandum generally so advised the employees. (Tr. 781–782.) It is not the change in starting time per se that is called into question but rather, how the Respondent arrived at the decision to change the time only for the reinstated strikers. Here, I am unpersuaded that the decision was predicated on lawful business factors. In short, I find that the Respondent violated Section 8(a)(3) and (1) of the Act, as alleged.

4. The request for information

By letter dated March 13, 1989, Laghetto requested of Epler, a seniority list for each of its plants covered by collective-bagaining agreements including the Diamond facility. Insofar as the request related to the Diamond facility, Laghetto testified credibly as follows:

> I requested that on March 13th, because we had not received the arbitrator's decision yet, and the contract was coming up for renegotiation. I knew that I had to start putting together a proposal for these people [replacements]. I did not know who they were. I didn't know how many employees there were at the Diamond [plant] currently working. I didn't know what job classifications were actually being filled. So in order for me to start to prepare, I had to have a seniority list. I had to be able to contact some of these people to get them to come in to negotiate with me, and I also needed their input, as we always do when we prepare for contract talks. I need their input on what changes they wanted to recommend.[12] [Vol. I, Nov. 15, Tr. 59.]

Laghetto did not hear from Epler regarding her request until nearly 2 months later in a letter dated May 10 and, even then, the information was not supplied. Instead, Epler informed Laghetto, that in order to process her request, he wanted to be advised ''with regard to each of the plants the reason for this request.'' (Jt. Exh. 8.) Laghetto did not respond to Epler's May 10 letter. She explained: ''[I] feel as the bargaining agent for the plants that I am entitled to this information in order to properly represent these employees'' (Vol. I, Nov. 15, Tr. 50). I find that the weight of the authority tends to support Laghetto's position.

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[10] As I also find for reasons noted infra, that the Respondent lawfully withdrew recognition from the Union immediately after the contract expired at the end of May, I find that it was not under any obligation to bargain over the change in question which occurred on or about June 5. Accordingly, I find that the Respondent did not violate Secs. 8(a)(5) and 8(d) and I shall recommend that these allegations be dismissed.

[11] On the other hand, for reasons discussed previously, when the illegal strikers were terminated, the Respondent could lawfully deem their seniority to have been eliminated and was under no legal obligation to restore such seniority on reemployment. (See sec. 2, supra.)

[12] I found *Laghetto* to be consistent, plausible, responsive, and candid with no apparent effort to embellish her testimony. It is difficult to discern where, if at all, *Laghetto's* testimony is contradicted by Respondent's witnesses or by documentary evidence. On assessing Laghetto's overall testimony, including demeanor factors, I found her to be a reliable and credible witness.

It is well established that an employer has a ''general obligation'' to provide information, on request, which is reasonably necessary to a union in carrying out its collective-bargaining responsibilities. *NLRB v. Acme Industrial Co*., 385 U.S. 432, 435–436 (1967); *NLRB v. Truitt Mfg. Co*., 351 U.S. 149 (1946); *Washington Hospital Center*, 270 NLRB 386, 400 (1984). In assessing whether the requested information is relevant or even potentially relevant, a broad discovery-type standard is to be applied. *Pfizer, Inc*., 268 NLRB 916, 918 (1984); *NLRB v. Truitt Mfg. Co*., supra. Whether such information is relevant and necessary is also determined by the factual circumstances on a case-by-case basis. *Proctor & Gamble Mfg. Co. v. NLRB*, 603 F.2d 1310, 1319 (8th Cir. 1979); *Postal Service*, 276 NLRB 1282, 1285 (1985). However there are certain types of information pertaining to unit employees that are so intrinsic to the core of the employer-employee relationship that the requested information is considered presumptively appropriate. See *San Diego Newspaper Guild v. NLRB*, 548 F.2d 863, 867 (9th Cir. 1977). A request, as in the instant case, for a seniority list has been treated as presumptively appropriate. See, e.g., *Belcon, Inc*., 257 NLRB 1341, 1347 (1981).

The Respondent argues that it did not unreasonably delay complying with the Union's request, at least up until April 19. It asserted that the delay was largely due to the uncertainties and confusion of dealing with the arbitrator's award which issued on March 21, approximately 1 week after the request was made. Thus, the Respondent arranged and conducted meetings with the Union on April 6 and 14 to discuss the implementation of the arbitrator's award. However, according to the Respondent, neither party knew how many of the striking employees would be returning so that it still could not provide the requested seniority list. While the Union did not at either session renew its request, it is noted that the Respondent did not indicate to the Union why it was having difficuities complying therewith or made any other reference to Laghetto's earlier request. As for not complying with the request on and after April 19, the Respondent relies largely on a petition given to Plant Manager Diehl on that date signed by a majority of the employees showing that they no longer wanted the Union as their bargaining agent. I find that the Board's decisions in *Toledo 5 Auto/Truck Plaza (Toledo)*, 291 NLRB 319 (1988); *John's-Manville Sales Corp*., 282 NLRB 182 (1986), and *Seneca Electric Co*., 265 NLRB 1531 (1982), relied on by the Respondent are distinguishable on their facts.

Here, unlike *Toledo*, the request was made while the contract was still in effect and more than a month before any evidence of union disaffection. In *Toledo*, inter alia, the request was made at a time when the company had ''substantiated evidence'' that the Union was no longer the majority representative. Similarly, in *John's Manville*, unlike the instant case, there was no contract in effect at the time of the request and the Respondent's refusal was justified on the basis that it had a legitimate basis for withdrawing recognition from the union. (Here, for reasons noted below, the Respondent could not lawfully refuse to fulfill its bargaining responsibilities until the contract expired at the end of May.) It is also noted, that in *Seneca Electric*, inter alia, the contract had expired at the time the request was made. Moreover, there, tending to militate against any dilatory tactics, it is noted that the the information was eventually supplied.

In the instant case, I am unpersuaded that the circumstances justified or even mitigated against the Respondent's failure to provide the requested information during the term of the contract, although it may excuse some of the delay in responding thereto. Here, Epler wrongly refused to provide presumptively appropriate information unless the Union first satisfied the Respondent with its reasons for the request. The Respondent has not made out a case or even contended that the information is confidential. Nor has it established some other legitimate defense for refusing to comply during the term of the contract. The duty to provide information as with the duty to bargain ''extends beyond the period of contract negotiations and *applies to labor-management relations during the term of an agreement.*'' See *Acme Industrial Co*., supra at 436, emphasis added. In short, I find the Respondent's failure to provide the requested information during the term of the contract is violative of Section 8 (a)(5) and (1) of the Act, as alleged.

5. The withdrawal of recognition

The record disclosed that on April 19, 1989, Plant Manager Diehl was given a document signed by 30 employees, all replacement employees, stating that they do not wish to have union representation. At that time there were approximately 28 former striking employees eligible to work, 20 of whom actually returned between April 19 and 24. Thus, if the document was free of taint, the Respondent had a sufficient basis for doubting the Union's continued majority status. See *United States Gypsum Co*., 259 NLRB 1105, 1112 (1982); *Guerdon Industries*, 218 NLRB 658, 660 (1975). The contract was due to expire on May 31, 1989. By letter dated May 3, 1989, Epler informed Laghetto that a majority of employees had provided the Company with objective evidence that they no longer wanted union representation and as a consequence, the Respondent would withdraw recognition when the contract terminated and that it was also cancelling the May 10 meeting which date had been arranged to begin negotiations for a new contract. (Jt. Exh. 6.)

For reasons discussed previously, I have found that the Respondent violated the Act independently by the size of its Christmas gift to the replacement employees back in December 1988 and its failure to furnish a seniority list as requested in the Union's letter of March 13, 1989, both of which occurred prior to signing of the petition reflecting union disaffection. While I have also found that the Respondent unlawfully discriminated against the reinstated employees by changing the starting time for the second shift, this action was taken in June 1989, after the Respondent had already withdrawn recognition and as such, after the fact and clearly unrelated to the signing of the petition. Thus, the question is whether a nexus has been shown to exist between the other unfair labor practice findings and the petition.

The Christmas gifts were given to the replacement employees 4 months before they signed the petition in question and there is no showing that these gifts were accompanied by other conduct designed to undermine the Union's majority status, such as antiunion statements. While I have found that the size of these gifts reflected adversely on Respondent's motivation, I cannot find, without more, that the petition some 4 months later was inspired, in whole or in part, by

the unlawful Christmas gifts.[13] Similarly, I fail to discern any connection between the failure to provide information and the petition in the circumstances of this case. In this connection, it is noted, inter alia, that there is no showing that any of signatories were aware that a seniority list or that any information had been requested by the Union at any time material. See *Airport Aviation Services Inc*., 292 NLRB 823 (1989). Rather, noting the timing of the petition, coming at around the same time that former striking employees were returning to work, I find it more likely that they expressed union disaffection out of fear that the Union was allied with the strikers to get them their jobs back at the expense of the replacements. Indeed, it is undisputed that the Union insisted on reinstating the strikers to the first shift. Since there was already a full complement of 32 employees on the first shift, the only way to fully satisfy the Union's position would be to displace most of those first-shift replacement employees.

On the basis of the foregoing and the entire record, I am unpersuaded that the unfair labor practices found impacted sufficiently on the petition so as to justify rejecting it as tainted. As noted above, in the absence of any demonstrated nexus, an employer may rely on such a petition to raise sufficient doubt regarding the Union's continued majority status to lawfully withdraw recognition. See *Johns-Manville Sales Corp*., 282 NLRB 182 (1986); *Airport Aviation Services Inc*., supra. Accordingly, I find that the Respondent did not violate Section 8(a)(5) and (1) of the Act, by withdrawing recognition from the Union and shall recommend that this allegation be dismissed.

6. The June 1989 layoff of second-shift employees

As noted previously, the General Counsel contends that the creation of the second shift by Respondent was a sham transaction designed to give the appearance of compliance with the arbitrator's award. To bolster this position, the General Counsel noted that the layoff of the second shift in June 1989 occurred only 2 months after it was first instituted. For reasons discussed above (sec. 2,a), I have rejected the allegation dealing with Respondent's decision to create a second shift at the Diamond plant. As for laying off the second-shift employees in June, Epler attributed this action largely to unexpected changes in market conditions such as higher interest rates. Epler testified that such changes impacted heavily on the residential brick construction industry causing the cancellation of large numbers of orders and the corresponding rise in inventory at the Diamond facility. Largely on the basis of credited corroborative testimony from two of Respondent's three principal distributors[14] and documentary evidence, I find that Epler's reasons for taking the disputed action are amply supported by the record.

The record disclosed that Epler met with his largest distributors in February 1989 and discussed projections for the rest of the year with regard to orders and shipments of brick. While the record also disclosed that the prime interest rate at around that time was on the rise, the Respondent and distributors appeared to have been influenced more by the banner production and sales experiences of the past 3 years, particularly the previous year, 1988, which was characterized by Fordenwalt, as an exceptional year. (Vol. II, Nov. 16, Tr. 19.) The projections turned out to be overly ambitious as interest rates continued to climb. That, coupled with adverse weather conditions, particularly in the month of June (Id. at Tr. 21), were factors which largely contributed to a downturn of business in the construction industry leaving many building projects in abeyance. In turn, the distributors, consistent with established practice (they do not maintain inventory), cancelled large orders of shipments of brick from Respondent's Diamond plant during the spring and summer months, generally regarded as the busy season. (See also R. Exhs. 4 and 5.)

In June, Respondent, faced with increased cancellation of orders and a corresponding growing inventory, decided it had to cut back on manufacturing and production and eliminated the newly instituted second shift. The first two employees were laid off on or about June 7 and the other employees on that shift gradually followed, until the last group of nine employees were let go on June 23. The employees on that shift were the junior employees having lost their company seniority when they were discharged back in 1988 for striking in the face of the contractual no-strike clause. Also in late May or early June, the Respondent began to cut back on the daily speed of the cars going through the tunnel kiln. (Vol. II, Nov. 16, Tr. 182–191; R. Exh. 14.) It is the speed that dictates how many bricks are produced and packaged. To a far lesser extent, the first-shift employees also suffered some of the consequences. Their hours were reduced by approximately 1-1/2 hours. (Vol. II, Nov. 16, Tr. 193.) Still further, it is noted that the business slump also impacted on Respondent's Wadsworth plant number five, where approximately eight employees were laid off and have not been recalled. (Id. at 199.)

Contrary to the General Counsel, I find that the record does not support the contention that the layoffs in June were in reprisal for the filing of the discharge grievance culminating in the arbitrator awarding them reinstatement.[15] There is a dearth of evidence tending to show that the Respondent in its long bargaining history has ever discouraged the filing of grievances or has otherwise undermined the arbitral process. While the Respondent was clearly displeased with the award, the record strongly supports and I find, that it took meaningful steps to comply therewith.[16] Thus, Respondent, after re-

[13] It is not alleged nor does the record reveal that the petition was the result of any unlawful solicitation efforts by the Respondent.

[14] Kenneth Fordenwalt, president of Koppes Clay Products, and Robert Wetzel, president of Abbey Hart Company, corroborated Epler's testimony in material areas including the unexpected slump in residential construction. While Fordenwalt and Wetzel were not entirely responsive or consistent, I believe their testimony overall was plausible and truthful and supported by Respondent's documentary evidence. No official of Face Brick Inc (''Face Brick''), the other principal distributor for Respondent testified. However, the record includes documentary corroborative evidence showing, inter alia, that Face Brick cancelled shipments of substantial residential brick from the Diamond plant in June 1989. (R. Exh. 6.)

[15] The Respondent has not hired a new employee since the layoffs occurred in June 1989.

[16] It is not contended that the Respondent was legally required to resubmit the matter to the arbitrator for clarification. The Respondent was displeased with an award which confirmed the Company's position that the discharged strikers participated in an ''illegal'' strike but, on the other hand, provided for their reinstatement, albeit, without backpay. In the circumstances of this case, I do not find that the

Continued

ceipt of the arbitrator's award, quickly took the initiative and arranged to meet and negotiate with the Union over the implementation of that award. At the first session with the Union on April 6, the Respondent proposed to reinstate the illegal strikers as permanent replacements left the Company. At that time the Respondent had already a full complement of employees and even had the strikers been lawful economic strikers, they would not have been entitled to more. The Respondent however went further; shortly after that first session, it proposed a vehicle (second shift) for reinstating the strikers immediately, thereby meeting the Union's principal demand. While the Union also wanted the strikers reinstated on the first shift, that could only have been accomplished at the expense of the replacements. As noted previously, the arbitrator did not direct the Respondent to discharge the replacements to make room for the strikers nor was such action required under the Act.

Under the foregoing circumstances, and on the state of the entire record, I reject the allegation that Respondent laid off the second-shift employees in violation of Section 8(a)(3) and (1) of the Act. Additionally, the Respondent did not violate Section 8(a)(5) and (1) of the Act. As I have found that the Respondent lawfully withdrew recognition from the Union on expiration of the contract at the end of May, it was not obligated to bargain over the decision to lay off the second-shift employees in June. Accordingly, I shall recommend that these allegations be dismissed.

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(3) and (1) of the act by:

(a) Discriminatorily departing from past practice by substantially increasing the amount of Christmas gifts it gave to replacement employees on or about December 19, 1988.

(b) Discriminatorily changing the starting time for reinstated striking employees in June 1989.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by refusing since on or about March 13, 1989, while the collective-bargaining agreement was still in effect, to furnish a seniority list to the Union, as requested, in order that the latter might perform its duties as exclusive collective-bargaining representative.

5. The Respondent did not violate the Act in any other respect.

6. The unfair labor practices set forth in paragraphs 3 and 4 above are unfair labor practices having an effect on commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in certain unfair labor practices within the meaning of the Act, I shall recommend that it cease and desist therefrom, and to take certain appropriate action to effectuate the purposes and policies of the Act.

In view of findings that the Respondent lawfully laid off all second-shift employees and is under no obligation to recognize the Union as the exclusive collective-bargaining representative for its employees at the Diamond facility, the recommended affirmative action is limited largely to the conventional notice posting.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[17]

ORDER

The Respondent, General Clay Products Corp., Nelsonville, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily departing from past practice with regard to the amount or size of the Christmas gifts given to employees to dissuade them from engaging in union activities.

(b) Changing the starting time or otherwise discriminating against former strikers who have been reinstated and have their status as employees restored under Section 8(d) of the Act.

(c) Refusing, upon request, to furnish the exclusive representative of its employees information relevant and necessary to the performance of its duties as exclusive collective-bargaining representative.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Post at its Diamond plant in the State of Ohio, copies of the attached notice marked ''Appendix.''[18] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(b) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the allegations here found to be without merit be dismissed.

Respondent's refusal to resubmit is tantamount to bad faith on its part.

[17] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[18] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT depart from past practice with regard to the amount or size of the Christmas gift given to our employees to dissuade them from engaging in union activities.

WE WILL NOT change the starting time or otherwise discriminate against our reinstated strikers who have had their status as employees restored under the National Labor Relations Act.

WE WILL NOT refuse to provide information requested by an exclusive statutory representative of our employees if necessary and relevant to the performance of its duty to represent you with respect to wages, hours, and terms and conditions of employment.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed them under Section 7 of the Act.

GENERAL CLAY PRODUCTS CORP.